Supreme Court, U.S.
FILED
05-913 JAN 19 2006
OFFICE OF THE CLERK

No. 05-

IN THE
Supreme Court of the United States

JIM GUY TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals misapplied *Bousley v. United States*, 523 U.S. 614 (1998), by holding that neither cause and prejudice nor actual innocence could be employed to excuse a procedural default for not raising a claim on direct appeal, even though at the time of the default and for years thereafter the government had maintained an incorrect position on the law applicable to the case and the Court of Appeals had agreed that the government's erroneous position might have merit.

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THE COURT SHOULD CORRECT THE EIGHTH CIRCUIT'S MISAPPLICATION OF *BOUSLEY v. UNITED STATES*, 523 U.S. 614 (1998), AND HOLD THAT CAUSE AND PREJUDICE AND ACTUAL INNOCENCE, THE TESTS FOR BOTH OF WHICH TUCKER CAN SATISFY, WILL EXCUSE PROCEDURAL DEFAULT FOR FAILURE TO RAISE TUCKER'S

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CITATION TO OPINIONS BELOW

This case is cited as *United States v. Tucker*, 419 F.3d 719 (8th Cir. 2005) (App. A). The unpublished opinion of the district court was filed on August 29, 2003 (App. B).

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The opinion of the Court of Appeals was issued on August 16, 2005. A timely petition for rehearing and rehearing en banc was filed, which was denied on October 21, 2005 (App. C).

STATUTORY AND RULE PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> . . . nor be deprived of life, liberty, or property, without due process of law

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has

denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated

by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain —

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

This case presents a question dealing with a § 2255 petitioner's entitlement to relief when it is ascertained that the government predicated its analysis of conspiracy liability on a repealed tax law but did not inform the petitioner despite his requests. Tucker's § 2255 petition seeking to vacate his guilty plea when he ascertained the government's error was denied as procedurally defaulted. Tucker argues that the District Court and the Court of Appeals misapplied *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), to deny him a chance to overcome the default.

On June 7, 1995, a grand jury in the Eastern District of Arkansas under the direction of Independent Counsel (OIC)

Kenneth Starr indicted Tucker, then the Governor of Arkansas, his former tax attorney John Haley and Tucker's former business associate William Marks on a charge of conspiracy to impede the calculation and collection of income taxes, a so-called *Klein* conspiracy, based on *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924, 78 S. Ct. 365 (1958). Tucker and Marks were also indicted on two non-tax counts.

In August, 1995, the indictment was dismissed by U.S. District Judge Henry Woods. The Eighth Circuit reinstated the indictment and disqualified Judge Woods. *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996) [*Tucker I*]. Upon remand, the case was assigned to District Judge Stephen M. Reasoner.

The *Klein* conspiracy count, Count 3, essentially alleged that between October, 1987, and October, 1990, Tucker conspired to obstruct and impede the IRS by engaging in a series of transactions in order to impede the IRS in determining the amount of corporate taxes which otherwise would have been due on the sale of various cable TV systems. The OIC asserted that there had been a tax loss in excess of $3.8 million. It was the avoidance of this very large amount which was alleged to be both the motivation for, and the result of, the alleged conspiracy. The indictment did not allege the identity of the taxpayer alleged to owe the tax, the statutory basis for the calculation of the tax, or the tax law which was the object of the alleged conspiracy, and in pretrial proceedings the District Court refused to order the OIC to provide the information.

Tucker and his counsel had based the transactions on legitimate business reasons, believed they were valid,